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Can You Clear Me Now?:
Weighing "Foreign Influence" Factors in Security Clearance Investigations

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Good morning Mr. Chairman, Members of the Committee, it is a pleasure to testify today on such an important topic. I have been handling cases involving national security for more than a decade, and I have represented nearly 100 individuals in security clearance cases before numerous federal agencies.

This is a period in our history when our country desperately needs individuals with foreign language expertise and intimate experience with other cultures to assist in the war against terror. The logical population from which to recruit individuals are those American citizens with foreign backgrounds. Yet our agencies are losing the ability to utilize numerous loyal Americans simply because they brazenly admitted to affection for their parents residing overseas, dared to telephone their siblings back in the home country or – through no action of their own – hold dual citizenship.

The disqualifying conditions of "Foreign Influence" and "Foreign Preference", especially, are often applied arbitrarily and inconsistently. Whether the country involved be an ally such as Israel or the United Kingdom or hostile such as Iran or China, there is typically little rhyme or reason why a clearance is denied or granted.

In recent years it has become common for the Defense Department to revoke an individual's clearance after having held one for years, even decades. Oftentimes these individuals have never misled or lied about their foreign relatives or origins, but DoD has suddenly decided that the person poses a risk that never previously existed before.

At the CIA individuals have wasted months through the application/training process only to eventually be informed that their

foreign background, which had neither changed nor been hidden from the outset, prevented the granting of a clearance.

Though my testimony is more critical than positive, I do wish to highlight that there are many shining examples of how some agencies, and the individuals employed therein, implement their security clearance programs. Indeed, I would rate the Defense Office of Hearings & Appeals (DOHA), as one of the better, if not, best venues for challenging a denial or revocation.

Executive Order 12968, issued by President Clinton in 1995, created the current framework for the security clearance process. In response Adjudicative Guidelines were issued in March 1997, in order to establish a common set of standards. On December 29, 2005, the President, through his National Security Advisor, issued revised Guidelines. These were to be "implemented immediately."

As far as I know, DoD is the only agency not to have done so. This posture is disappointedly not surprising. It was not until April 20, 1999, after publication in the Federal Register (a useless act), that DoD adopted the March 1997 Guidelines. And actual application only commenced with SORs issued after July 1, 1999. Thus, it might not be until early 2008 before DoD implements the 2005 Guidelines. That is unacceptable.

Only DoD likely knows how many revocation/denials have been based on Foreign Influence or Preference concerns but the number has increased during the last few years. For decisions posted on DOHA's Website this year alone approximately 25% involved Foreign Influence.

How significant an impact can there be between application of the old and new guidelines?

Let me focus on Foreign Influence and address Foreign Preference during the Q &A if desired. Under the 1997 Guidelines, one of the more common disqualifying conditions is whether an individual or his family members may be potentially vulnerable to coercion,

exploitation, or pressure by a foreign power. To mitigate this concern one can seek to prove the contrary. Yet it is virtually impossible for any individual to truly affirmatively prove a negative and demonstrate that a foreign relative or contact is not in some way possibly subject to exploitation by a foreign power.

Another available mitigating factor is that contact and correspondence with foreign citizens are casual and infrequent. Unfortunately, the terms have no standardized definition or application.

Consider one case in particular where in 2004 I unsuccessfully represented a defense contractor originally from Pakistan. My client provided unrefuted testimony that he had infrequent contact with his siblings 3-4 times per year. Although the Judge ruled that there was nothing in the record to indicate that one of my client's brothers was an agent of a foreign power, she concluded that "there is no evidence to show that he is not in a position to be exploited by a foreign power in a way that might force Applicant to choose between him and his well-being and his loyalty to the United States."

Yet at the same time the Judge also concluded that "[n]othing in Applicant's testimony or demeanor suggested he was not a loyal American citizen and a credit to his adopted country." What then was beyond the Judge's rationale for the unfavorable decision? She believed that:

> Pakistan is on the front lines in the war against international and regional terrorism and, despite the efforts of its government, there are individuals and groups within Pakistan who have acted and continue to act in a hostile manner to U.S. security interests.

Beyond the fact that in today's world this description fits dozens of countries, including even the U.S. itself, it was completely inconsistent with factual findings reached in numerous other DOHA cases and contrary to the official position of this Administration. For example, just three months after 9/11 another DOHA Judge held:

> Pakistan is not a country hostile to the security interests of the US, but a country whose political institutions (while not democratic at present) are sufficiently aligned with our own traditions (which include the rule of law) to absolve Applicant of any foreseeable security risk.

Under the 2005 Guidelines I have no doubt that my client would have had a much greater chance of attaining a security clearance. Even a casual comparison glance between the 1997 and 2005 Guidelines should leave a reader with the notion that the revisions are more relaxed and flexible, especially with Foreign Influence/Preference cases. For an experienced practitioner, the new Guidelines can make a world of difference.

The 2005 Guidelines reflect practical and rational modifications to fit a more realistic environment. They legitimately raise the bar, or perhaps more precisely set a more appropriate bar, for the government to revoke/deny an individual's clearance based on Foreign Influence/Preference. The most frequently cited disqualifying condition now requires a "heightened risk", though that term is undefined, "of foreign exploitation, inducement, manipulation, pressure, or coercion."

More importantly the mitigating conditions now explicitly take into consideration "the nature of the relationships with foreign persons" and "the country in which these persons are located." The bar is lowered for the individual to demonstrate that "the positions or activities of those persons in that country are such that it is *unlikely* the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S."

If DoD denies a security clearance based on application of the 1997 guidelines when a favorable result could have been attained under the 2005 guidelines then DoD will have harmed the national security interests of the United States.

DOHA Appeals

Let me briefly comment on the DOHA appellate review. With over 30 administrative DOHA judges the degree of variance in outcomes is no surprise. Of course, this is no different than with any lower court. But when inconsistent rulings are rendered in the judicial system usually there is some degree of balance or established policy eventually crafted by a higher appellate court. Yet no such thing exists with DOHA as its Appeal Board rarely seeks to ensure consistency.

On appeal, the Board is not supposed to review a case *de novo*. However, it *often* issues its own *de novo* decisions in a manner and frequency that is quite alarming.

Unlike the majority of federal agencies, a favorable clearance decision attained by an individual can be appealed by the Government. When that occurs, the odds are overwhelmingly in favor of the Government. A recent study that reviewed all DOHA Appeal Board decisions since January 2000 concluded that:

> its standards of appellate review are so vague and elastic that the Board can and does reverse or sustain virtually any decision of a DOHA administrative trial that fits its view of the facts, or despite the facts. The Appeal Board will depart from its frequently stated standards of appellate review to reach a decision that appears to simply substitute its judgment for that of the trial judge. It has done this with some frequency, but almost without fail in one category of cases, those of applicants with contacts or relatives in, or other ties to foreign countries.

Since 2000, the Appeal Board, in cases involving a foreign connection, “has affirmed all (144) of applicants’ appeals of decisions involving foreign countries denying a clearance, and reversed all but four (45) of the government’s appeals of such decisions granting a clearance.”

In my submitted testimony I suggest 15 recommendations for consideration. Let me just highlight a few. Congress should:

- Require DoD to adopt the new Guidelines immediately.

- Consider removing DOHA's ability to appeal favorable decisions unless a more balanced framework can be instituted.

- Task GAO to conduct a thorough assessment of the security clearance appeal process as it is implemented throughout the federal government, and not just DoD.

- Create an administrative hearing system similar to that of DOHA and DOE across the board at all federal agencies.

- Create an independent body outside of the involved federal agency to adjudicate final appellate challenges to an unfavorable security clearance decision; OR

- Grant the federal judiciary statutory jurisdiction to review substantive security clearance determinations.

Again, I thank you for the opportunity to appear before this august body today. I am more than willing to answer any questions you might have, as well as work with Members of this Committee and its staff to best design the legislative actions I have suggested today.